
CRA'S NEW ANTI-TERRORISM CHECKLIST – A STEP IN THE RIGHT DIRECTION

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A. INTRODUCTION

Canada Revenue Agency (“CRA”) has recently released the long-awaited Checklist for Charities on Avoiding Terrorist Abuse (the “Checklist”),¹ a checklist that is intended to help Canadian charities identify vulnerabilities to terrorist abuse and develop good management practices. CRA indicates that the Checklist is based on international and domestic concerns, experience, and guidance, and is not meant to be a comprehensive guide. Rather it is intended to help Canadian registered charities focus on areas that might expose them to the risk of being abused by terrorists or other criminals. This *Anti-Terrorism and Charity Law Alert* reviews the contents of, as well as provides some comments on, the Checklist.

B. WHERE WE ARE NOW

Canada’s anti-terrorism legislation is very much a product of a complex array of international initiatives, conventions and multi-lateral agreements that establish daunting requirements for charities. For the most part, these same international requirements acknowledge the need to strike a balance between efforts to thwart terrorist financing and ensure that legitimate charitable programs can continue to operate. In this regard, the Financial Action Task Force (“FATF”), in a key policy document concerning the oversight of the non-profit organizations (“NPO”) section internationally, reminds its member countries to ensure that “(m)asures adopted by countries to protect the NPO sector from terrorist abuse should not disrupt or discourage

¹ Available at <http://www.cra-arc.gc.ca/tx/chrts/chcklsts/vtb-eng.html>.

legitimate charitable activities” and also that those measures “should to the extent reasonably possible avoid any negative impact on innocent and legitimate beneficiaries of charitable activity.”²

In many respects, the development of Canada’s anti-terrorism legislation is directly related to developments in the international arena over the last two or three decades. This includes the broad range of measures from non-binding resolutions, declarations or recommendations of the United Nations General Assembly and various intergovernmental bodies, to binding multilateral conventions and Security Council Resolutions, to policies and recommendations from other intergovernmental policy-making bodies, such as the G-8, G-20, the FATF, the International Monetary Fund and the World Bank, in which Canada has been a part. All of these bodies have and continue to take measures to curtail terrorism and terrorist financing, and require considerably different levels of compliance from member states.

Arguably, Canada has far exceeded most other member countries in terms of its compliance with international requirements to combat terrorist financing. As such, Canadian charities seeking to comply with applicable anti-terrorism legislation are placed in a unique position that cannot be addressed by international due diligence standards. This was recognized by the House of Commons Subcommittee on the Review of the *Anti-Terrorism Act*. The report acknowledged that there is “little practical guidance”³ in Canada that would assist charities in introducing due diligence guidelines. In this regard, while the CRA in the past has introduced policies concerning charities operating outside of Canada and maintaining adequate books and records, prior to the introduction of the Checklist, the CRA delegated its function of providing guidance to charities in Canada in relation to the development of best practice guidelines for compliance with anti-terrorism legislation to the U.S. and other international governmental and quasi-governmental organizations. The House of Commons Subcommittee recommended that the CRA consult with the charitable sector to develop “made in Canada” best practice guidelines, suggesting that these best practice guidelines should incorporate “both general policies and checklists that could be administered by applicants and registered charities” in carrying out their due diligence assessments.⁴

In early 2008, CRA announced that it was embarking on the development of the made-in-Canada guidelines.

² FATF, *Interpretative Note to Special Recommendation VIII: Non-Profit Organizations* (Paris: FATF, 2006).

³ House of Commons Subcommittee on the Review of the Anti-Terrorism Act, *Rights, Limits, Security: A Comprehensive Review of the Anti-Terrorism Act and Related Issues*. Final Report of the Standing Committee on Public Safety and National Security (Ottawa: 2007) at 36.

⁴ See Terrance S. Carter and Sean S. Carter, “Major Changes to Anti-Terrorism Laws Recommended by House of Commons Subcommittee Report” in *Anti-terrorism and Charity Law Alert* No. 13 (April 18, 2007), available at www.antiterrorismlaw.ca.

C. THE CHECKLIST

While the introduction of the Checklist is a step in the right direction in recognizing the need to provide guidance to the Canadian charitable sector, a review of the the Checklist suggests that CRA may not have gone far enough in providing the necessary practical guidance to which the House of Commons Subcommittee was referring. In this regard, the Checklist consists only of the following questions:

- “Do you know about the individuals and entities associated with terrorism, which are listed in Canada under the United Nations Act and the *Criminal Code*? Are you aware of the *Criminal Code* and the *Charities Registration (Security Information) Act* provisions on financing and supporting terrorism — and the consequences of breaching the provisions?”
- Do you have a good understanding of the background and affiliations of your board members, employees, fundraisers, and volunteers?
- Have you read the CRA guidance about keeping adequate books and records, activities, engaging in allowable activities, operating outside Canada, and charities in the international context? Do you follow this guidance?
- Do you have appropriate, sound, internal financial and other oversight and verification controls — for example, appropriate delegations and separations of authority over the collection, handling, and depositing of cash and the issuing of receipts?
- Do you transfer money using normal banking mechanisms, wherever possible? When it is not, do you use reputable alternative systems, and have strong additional controls and audit trails to protect your charity’s funds and show how and when they were used?
- Do you know who uses your facilities and for what purpose — for example, your office or meeting space, name, bank account, credit cards, Web site, computer system, telephone or fax — what they are saying, and what materials they are distributing or leaving behind?
- Do you try to find out who else might be supporting a person or cause that you are endorsing in public statements, and who uses your name as a supporter?

- Do you know where your donations and other support really come from?
- Do you know who has ultimate control over the project that your charity's money and resources are benefiting, and what the money and resources are used for, including after the particular project is finished?
- Do you know your partners in delivering the work you are doing, and their affiliations to other organizations?
- Do you have clear written agreements with agents/contractors/other partners, in Canada and abroad, covering what activities will be undertaken and how they will be monitored and accounted for? Do you check that the agreements are being followed?"

The Checklist then ends off by providing a number of links to helpful websites and international guidelines for more information, such as the Charity Commission for England and Wales' *Themes and lessons from the Charity Commission's compliance work, 2007–08 Operational Guidance – Charities and Terrorism*, and the U.S. Department of the Treasury's *Anti-Terrorist Financing Guidelines – Voluntary Best Practices for U.S.-Based Charities*.

D. COMMENTARY

Notwithstanding the positive step that CRA has taken in producing the Checklist, for which the CRA is to be applauded, the Checklist does raise a number of concerns, most of which relate to the overall usefulness of the document. These issues are briefly discussed below.

1. Not Sufficient Context for Charities

While brevity is occasionally considered to be a virtue, in the context of providing registered charities with guidance with respect to anti-terrorism provisions in Canada and abroad, brevity can be a dangerous thing. Charities and those who participate in charitable programs need to have a clear understanding of the possible penalties that exist for failure to comply with anti-terrorism legislation. In particular, charities should understand the broad scope of the *Criminal Code* (Canada) provisions pertaining to terrorist activity and, in particular, the facilitation provisions thereof. A brief checklist with

only passing references to external guidelines arguably does not provide sufficient information for charities to be properly informed and to adequately conduct the necessary due diligence investigations required for necessary compliance purposes.

2. Potential Undue Sense of Simplicity

The use of a short checklist with some additional commentary with links to outside documents published by both the CRA and other international bodies may create the impression of an undue sense of simplicity in relation to a charity's compliance with Canada's anti-terrorism legislation. As there are significant consequences for both the charity and the individual directors and officers if they are found to have unwittingly assisted a terrorist organization or terrorist activity (or even if there is an allegation of such support), it is potentially misleading to suggest that compliance is as simple as what is set out in a brief checklist.

In comparison, the U.S. Department of the Treasury (the "Treasury Department") *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities* (the "U.S. Guidelines"), provide 16 pages of valuable recommendations for the charitable sector to consider in adopting practices that better protect it from the risk of abuse or exploitation by terrorist organizations, but even with that the Treasury Department makes it clear that adherence to the U.S. Guidelines is insufficient in and of itself to protect charities from abuse by terrorist organizations or terrorist activities.

As the existing models of best practice guidelines suggest, it is not possible to provide one-line statements concerning due diligence practices. The lack of meaningful commentary in relation to each due diligence guideline may result in guidelines that are open to misinterpretation, thereby unnecessarily exposing charities that are otherwise attempting to comply with anti-terrorism legislation.

3. Continued Delegation

Over the last eight years, there has been repeated calls from both government and the charitable sector for "made in Canada" guidance with respect to compliance with anti-terrorism guidelines. In this regard, the Checklist appears to miss the opportunity to provide meaningful guidance to Canadian charities and instead continues to indirectly delegate this function to foreign governments and quasi-governmental bodies. For Canadian charities to not have a "one-stop shop" for anti-terrorism

compliance means that they will continue to be forced to refer to multiple documents and differing standards of compliance, which will likely result in continued confusion for Canadian charities. For example, is compliance with the Checklist sufficient? or should there also be compliance with the U.S. Guidelines and U.K. Charities Commission guidelines that are listed in the Checklist? And as each international guideline has differing standards, which guideline is authoritative in the event of conflict, since each one obviously has a slightly different slant given the differences in domestic anti-terrorism laws in each country?

Continued delegation does not recognize that “made in Canada” due diligence guidelines are necessary in recognition of Canada’s unique position given its broad anti-terrorism legislation and its significant international commitments that have driven its legislation. In other words, compliance with the U.S. Guidelines, or those of the FATF or the U.K. Charities Commission does not necessarily ensure compliance with Canadian anti-terrorism legislation, i.e. those unique aspects of Canada’s anti-terrorism legislation that are not replicated elsewhere.

4. Excessive Recommendations

Several of the recommendations in the CRA Checklist are potentially excessive and may therefore be difficult for charitable organizations to comply with.

First, there is the recommendation that the charitable organization should not only know the individuals or organizations that are using its facilities, but the charity should also know the subjects they are discussing and the materials they are distributing/leaving behind. A fundamental principle of all due diligence guidelines concerning anti-terrorism is that the charity should know who they are dealing with. However, it appears to be excessively burdensome to require a charity to know what subjects are being discussed and all the materials that are being distributed, etc. by people using the office, meeting space or telephone or fax of a charity.

There is a further concern that the Checklist may be unwittingly suggesting that it may be appropriate and/or acceptable to permit other individuals or groups to use the charity’s bank account or credit cards, provided that the charity knows what is being said or left behind, which would arguably be a

breach of the directors' common law fiduciary duties to the charity, as well as resulting in other compliance problems with the CRA.

Second, there is the recommendation that the charity take reasonable steps to determine "who else might be supporting any person or cause you are endorsing in any public statements". As there are possibly thousands of individuals and groups that may support a cause, it seems to be an excessive burden to place on a charity to determine who else supports the same cause without any corresponding benefit in relation to anti-terrorism due diligence.

Third, there is the recommendation that the charity have a "good understanding of the background and affiliations" of its board members, employees, fundraisers and volunteers. In many situations, such an obligation would require a charity to keep extensive dossiers on literally thousands of individuals, with little corresponding benefit and possibly significant detriment to the effective functioning of the organization. For example, what benefit is obtained in relation to compliance with anti-terrorism legislation by a charity having a "good understanding of the background and affiliations" of a volunteer who serves meals or cleans dishes in a soup kitchen, and how many individuals are going to volunteer their time and talent if they are subjected to such types of scrutiny?

E. CONCLUDING COMMENTS

Although due diligence is not a defence for violations of the anti-terrorism laws in Canada and abroad, or against revocation of charitable status under the *Income Tax Act*, effective due diligence is, at the very least, necessary in order to show a desire to comply. Apart from compliance with anti-terrorism laws, maintaining due diligence is also mandatory in accordance with the common law fiduciary duties of directors to protect charitable property.

Prior to and subsequent to the 9/11 terrorist attacks on the U.S., Canada has implemented very broad and onerous anti-terrorism legislation in compliance with (and arguably exceeding) its international obligations. As the Canadian anti-terrorism legislative landscape is unique, there is a strong need for a “made in Canada” due diligence set of guidelines from the CRA to assist Canadian charities in complying with their obligations under the anti-terrorism legislation. Accordingly, it is not sufficient to provide charities with a simple checklist, and it is also not sufficient to seemingly delegate this obligation to establish standards to foreign governments and international quasi-governmental bodies.

Canadian charities deserve comprehensive guidelines and guidance from the CRA that does not force the charity to reconcile multiple international standards in order to comply with Canadian anti-terrorism legislation in a vacuum. In this regard, while the CRA is to be applauded for trying to develop a “made in Canada” set of due diligence guidelines, the Checklist does not fully meet this goal and may instead be the cause of further confusion for Canadian charities in this difficult area of the law.